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Revised Interim Final Guidance on Indian Involvement in the Superfund Program

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OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

OSWER Directive 9375.5-02A

MEMORANDUM

SUBJECT: Revised Interim Final Guidance on Indian Involvement in the Superfund Program -- Directive 9375.5-02A

FROM: Henry L. Longest II, Director
Office of Emergency and Remedial Response

TO: Director, Waste Management Division
Regions I, IV, V, VII, VIII
Director, Emergency and Remedial Response Division
Region II
Director, Hazardous Waste Management Division
Regions III, VI
Director, Toxic and Waste Management Division
Region IX
Director, Hazardous Waste Division
Region X

I. PURPOSE

On October 18, 1989 this directive was issued to provide guidance on the involvement of federally recognized Indian Tribes, which are treated substantially the same as States in the Superfund program. Since that time, numerous questions have arisen which necessitated the reissuance of this guidance with minor clarifying changes.

II. BACKGROUND

The Comprehensive Environmental Response, Compensation, and Liability Act, as amended by the Superfund Amendments and Reauthorization Act of 1986 (hereafter referred to simply as CERCLA) requires the Environmental Protection Agency (EPA) to afford Indian Tribes substantially the same treatment as it does to States in the implementation of the Superfund program (CERCLA, Section 126). Since opportunities for involvement of the governing bodies of Indian Tribes are substantially the same as for State involvement, this guidance is intended to supplement and reference what is in existence for EPA Regional personnel and to highlight issues specific to Indian Tribal involvement in the

Superfund program. In addition, the guidance reflects the Agency's growing experience with States, Indian Tribes, and political subdivisions in CERCLA implementation.

This guidance is being issued as Interim Final consistent with the issuance of the Agency's regulation 40 CFR 35 Subpart O, "Cooperative Agreements and Superfund State Contracts for Superfund Response Actions," (54 Federal Register 4132, January 27, 1989). EPA's regulation at 40 CFR 35 Subpart O and this guidance replace and supercede the "Revised Draft Guidance on Indian Involvement in the Superfund Program," OSWER Directive 9375.1-10, August 4, 1988. Comments to 40 CFR 35 Subpart O will be considered in any revisions to this guidance, as final guidance is developed.

This Interim Final guidance is one in a series of Directives to carry the number 9375.5, which is guidance relating to State, political subdivision, and federally recognized Indian Tribal involvement in the Superfund program. We recommend setting aside a special binder for the Directives in this 9375.5 series. Indexing and keywording will be done under the Office of Solid Waste and Emergency Response (OSWER) Directives System.

III. OVERVIEW OF INDIAN TRIBAL GOVERNMENT INVOLVEMENT IN SUPERFUND

Under CERCLA, EPA has the authority to spend Superfund money to clean up hazardous waste sites or to take enforcement action against responsible parties to compel them to achieve privately financed cleanups. The official inventory of potential hazardous waste sites is found in the Comprehensive Environmental Response, Compensation and Liability Information System (CERCLIS). CERCLIS is the data base that is used by EPA Headquarters and Regional personnel for Superfund site, program, and project management. EPA may expend funds to respond to immediate threats to human health or the environment at any hazardous waste site under CERCLA removal authority. EPA may also expend funds to rank sites for inclusion on the National Priorities List (NPL), a list of the nation's most hazardous waste sites. This is called pre-remedial response. Once a site is on the NPL, EPA may expend funds to conduct response, which includes analysis and planning prior to the selection of an appropriate long-term remedy.

The EPA Regional Administrator determines on a case-by-case basis whether the proposed cleanup of a site or release should be conducted under laws or funding sources other than Superfund, the Fund of last resort. Examples of other laws under which cleanup may be conducted include: the Uranium Mill Tailings

Radiation Control Act of 1977, the Surface Mining Control and Reclamation Act of 1977, and the Resource Conservation and Recovery Act, as amended by the Hazardous and Solid Waste Amendments of 1984.

A. Statutory Requirements

Section 121(f)(1) of CERCLA, and Section 300.500 of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) proposed rule (53 Federal Register 51509, December 21, 1988) require EPA to ensure "substantial and meaningful involvement" of States in Superfund response actions. Section 126 of CERCLA contains specific provisions for the general treatment of Indian Tribes as States. Together these requirements dictate that EPA interact directly with Indian Tribes and provide the governing bodies of Indian Tribes the opportunity to be involved in the Superfund program.

Section 104(d)(1) of CERCLA, authorizes EPA to enter into Cooperative Agreements with States or Indian Tribal governments to carry out response actions authorized in Section 104, if the State or governing body of the Tribe is deemed capable. Therefore, under Section 104, EPA may provide the necessary funds to States or the governing bodies of Indian Tribes either to conduct response actions as the lead agency (40 CFR 35.6100 and 35.6110), or to defray the cost of their involvement as a support agency during an EPA-lead response. (See support agency Cooperative Agreement requirements in 40 CFR 35.6900 through 35.6920.)

To be afforded substantially the same treatment as States under Section 104 of CERCLA, the governing body of the Indian Tribe must:

- Be federally recognized; and
- Have a tribal governing body that is currently performing governmental functions to promote the health, safety, and welfare of the affected population or to protect the environment within a defined geographic area; and
- Have jurisdiction over a site listed in CERCLIS or a site that is proposed or listed on the NPL at which a Fund-financed response is contemplated.

B. Regulatory Requirements

States and federally recognized Indian Tribes that wish to assume a lead or support agency role during Superfund response may seek Superfund money to do so pursuant to the requirements set forth in 40 CFR 35 Subpart O. This regulation specifies that the governing body of a federally recognized Indian Tribe must comply with applicable Superfund assistance requirements except those concerning intergovernmental review (40 CFR 35.6060 and 35.6110) and certain criteria regarding the development of response-related health and safety plans (40 CFR 35.6055 and 35.6105(a)(4)). In addition, the requirements set forth in 40 CFR 35.6800 are applicable to EPA-lead responses under Indian jurisdiction.

Copies of the Interim Final regulation 40 CFR 35 Subpart O are available in each EPA Regional grants office and the Grants Administration Division in EPA Headquarters.

C. Federally Recognized Indian Tribes

Section 101(36) of CERCLA defines the term Indian Tribe to mean "any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native village but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."

The Bureau of Indian Affairs (BIA) publishes a list of federally recognized Tribes in the Federal Register on an annual basis. The BIA list is composed of two parts:

- Indian Tribal entities recognized and eligible to receive services from the United States Bureau of Indian Affairs, and

- Alaskan native entities recognized and eligible to receive services from the United States Bureau of Indian Affairs.

In some instances, a Tribe that has been federally recognized may not have been added to the BIA list since the last revision. In these cases, verification of status can be made through documentation provided by the Tribe or through the Branch of Acknowledgment and Research, BIA Headquarters, in Washington, D.C.

D. Jurisdictional Authorities

EPA must determine Tribal, State, or Regional jurisdiction

for sites or releases on, or adjacent to, an Indian reservation when enforcement, removal, pre-remedial, or remedial response is to be taken. The considerations for each jurisdictional determination are discussed below.

1. Indian Tribes

A determination of whether a Tribe has jurisdiction over a site should be made by the Office of Regional Counsel based on documentation submitted by the governing body of the Indian Tribe. Regional Counsels may confer with Headquarters and other Regional Offices in making jurisdictional determinations since expertise in Indian law may vary from Region to Region. Assistance in determining Tribal jurisdiction also is available from BIA.

EPA is not granting, endorsing, or revoking any jurisdictional claims in making the determination that an Indian Tribal government has jurisdiction over an area adequate to meet CERCLA's requirements to be treated essentially as a State. The courts usually have held that Tribes retain jurisdiction over non-Indian lands within the boundaries of their reservations, if activities on such lands affect the health and safety of the Tribes; CERCLA waives the 104(c)(3) assurances for all lands "within the borders of an Indian reservation."

2. States

States generally lack regulatory jurisdiction on reservation lands. When a release is contained exclusively within the boundaries of an Indian reservation, States may be included in a cleanup, if appropriate. When a hazardous waste release affects lands both within and beyond the boundaries of lands within the jurisdiction of an Indian Tribal government, State participation is necessary.

EPA will encourage coordination between States and Indian Tribes when releases originate in the jurisdiction of one and affect the other. The Region will evaluate requests for lead agency designation to undertake response at such sites on a case-by-case basis in consultation with the affected governing body of the Tribe and State. Federal lead may be appropriate for responding to releases that impact both the State and the Indian Tribe. In these instances, support from both the State and governing body of the Indian Tribe is desirable, and both entities may request assistance to defray the cost of involvement as support agencies. (See "Requirements for Support Agency Activities Under Cooperative Agreements," 40 CFR 35.6900 through 35.6920.) A three-party agreement among EPA, the State, and the

governing body of the Indian Tribe is recommended to define and coordinate roles, and ensure compliance with the requirements of Section 121 of CERCLA, for response activities prior to remedial action (see Section VI.B of this directive). For the remedial action phase of a Superfund response, a Superfund State Contract (SSC) may be required (see 40 CFR 35.6800).

3. EPA Regions

Although the Office of Management and Budget (OMB), in Circular No. A-105 "Standard Federal Regions" designates a single EPA Region to be responsible for each Indian reservation or for those lands within a Tribe's jurisdiction that cross Regional boundaries, OMB has agreed that federally recognized Indian Tribes may deal directly with a Region other than the one officially designated. However, this arrangement should be temporary and for a particular project, and should be documented in writing.

Lead agency designation for responding to releases that impact both the Indian Tribe and State in another Region may require a Federal-lead. In these instances, an agreement among the governing body of the Indian Tribe and the impacted States and EPA Regions should be developed to define and coordinate roles, and to ensure compliance with the requirements of Section 121 of CERCLA.

IV. THE ROLE OF INDIAN TRIBAL GOVERNMENTS DURING RESPONSE

A. Pre-Remedial Response

The objective of the pre-remedial program is to examine every site that is on EPA's inventory of potential hazardous waste sites in CERCLIS and to determine if the site requires further response under CERCLA. The pre-remedial process begins with a preliminary assessment (PA), which involves a site visit and an evaluation of existing data, followed by a site inspection (SI), if warranted, to gather and analyze samples of potentially impacted air, water, and soil as well as to gather additional information required to identify potential priority sites.

EPA policy requires that all PAs must be completed within one year of site entry into CERCLIS. This is true for all sites in CERCLIS, including those on lands under the jurisdiction of Indian Tribal governments. Indian Tribes can participate in identifying sites to be added to CERCLIS by reporting releases within their jurisdiction to the National Response Center (NRC). Indian Tribal governments should call EPA Regions directly in non-emergency situations. To assist Tribal governments in

identifying potential hazardous waste sites, EPA has developed a handbook detailing Superfund's site discovery program specifically, and the Superfund program in general. EPA is distributing this handbook, which tells what to do if a potential site is discovered, to all Indian Tribes. Additional copies will be available through EPA Regional Offices.

Whenever a site within the jurisdiction of an Indian Tribal government is in CERCLIS, EPA Regions will consult [as specified in the proposed NCP [40 CFR 300.505(b)(2)] with the Tribal government during the Superfund process to establish priorities for Fund-financed response activities. These priorities result in the Agency's Superfund Comprehensive Accomplishments Plan (SCAP), which lists all sites and activities to be funded in each fiscal year. Inclusion of a site in the SCAP is necessary for any remedial funds to be expended on a site, although pre-remedial funding does not require listing of specific sites on the SCAP.

For Indian Tribal-lead activities, requirements and procedures for funding through Cooperative Agreements with EPA are substantially the same as those for States. PAs and SIs are conducted in the same manner for sites within Tribal jurisdiction as for all other sites in CERCLIS. PAs and SIs may be conducted as either Federal-lead or Indian Tribal-lead via a Cooperative Agreement consistent with the pre-remedial Cooperative Agreement requirements in 40 CFR 35.6060. During Federal-lead pre-remedial response at sites within the jurisdiction of a federally recognized Indian Tribe, EPA will consult with the governing body of an Indian Tribe on PA/SI data gathering and analyses.

Data collected during PAs and SIs are used to evaluate whether sites qualify for CERCLA remedial response. These data are used to calculate Hazard Ranking System (HRS) scores that reflect the relative risks from actual or potential migration of substances through ground water, surface water, and air. One set of criteria is used to rank all sites regardless of location.

Sites that have an HRS score above 28.5 and meet the criteria established by the NCP are eligible for inclusion on the list of candidate sites on the NPL for Fund-financed remedial response. Sites that do not score 28.5 or above and are not proposed for the NPL are not eligible for Fund-financed remedial response under CERCLA. However, if the situation warrants, a removal may be undertaken to mitigate an immediate threat. Removal actions are discussed later in this section of the guidance.

EPA will ensure that the governing body of a federally recognized Indian Tribe is given substantially the same opportunities as a State for involvement in pre-remedial activities, which are required under CERCLA:

- Consultation on the information to be used in developing the HRS scores for sites within Indian jurisdiction before EPA performs the quality control review of the HRS package for each site.

- Review of sites proposed by EPA for listing on the NPL. Note however, that under CERCLA Section 126(a), a tribe is not assured of at least one site on the NPL.

Regional Offices will ensure that the governing bodies of Indian Tribes are provided these opportunities for involvement in pre-remedial actions taking place on lands within their jurisdiction to ensure that the intent of Section 121 of CERCLA and the NCP (40 CFR 300.515(c)) is carried out.

B. Remedial Response at NPL Sites

Remedial response is conducted in the same manner for NPL sites whether the sites are located on, or directly impact Indian land under Tribal jurisdiction. All existing program regulations, requirements, policies, and procedures for remedial response are applicable. Remedial response consists of remedial investigation (RI), feasibility study (FS), remedial design (RD) and remedial action (RA). Regardless of lead-agency designation, Indian Tribes will be afforded substantially the same opportunity as States to become involved in the response. Consistent with CERCLA Section 126(a) and as provided in the proposed NCP, that involvement may include:

- Identification and attainment of Indian Tribal applicable or relevant and appropriate requirements (ARARs), standards or other criteria, guidance and advisories, including cultural requirements or standards. Indian Tribal ARARs are promulgated Tribal laws or regulations and are recognized similarly to State ARARs.

- Participation in the development of the remedial action plan and identification of alternative responses.

- Opportunity to concur on remedy selection.

- Opportunity for joint inspection of the remedy by EPA

and the Tribal government, which should take place at conclusion of construction of the remedy prior to the operational and functional phase of the remedial action.

- Consultation with and concurrence of the Tribe on deletions from the NPL.

If the Indian Tribal government does not concur with the remedy, the Region should follow a dispute resolution process similar to that used for State nonconcurrence or resolution of differences between agencies, as described in the preamble to Subpart F of the proposed NCP.

EPA's regulation at 40 CFR 35.6800(a)(1) requires a Superfund State Contract (SSC) with a federally recognized Indian Tribe before EPA initiates a Federal-lead remedial action at a site under Indian jurisdiction. Federally recognized Indian Tribes are exempt by law from providing the CERCLA Section 104(c)(3) assurances. EPA will provide for off-site disposal and be responsible for operation and maintenance (O&M) of the remedy, although another Federal Agency may manage the O&M of the site. A case-by-case determination may be made as to who will oversee the responsibility for O&M. O&M may be managed by the Tribe if EPA and the Tribe find this acceptable. Pursuant to 40 CFR 35.6810(e) and Section 104(j) of CERCLA, however, the federally recognized Indian Tribe must assure EPA that it will accept transfer of any interest in real property acquired by EPA. An SSC with the federally recognized Indian Tribe is the required mechanism for obtaining this assurance prior to initiation of an EPA-lead remedial action.

C. Removal Actions

Removal actions are a mechanism for conducting quick response to protect public health and the environment from releases or threats of releases of hazardous substances. Fund-financed removal actions can be conducted at NPL or non-NPL sites when the criteria established in the proposed NCP (40 CFR 300.410 and 300.525) are met. All removals on Indian lands must have concurrence by EPA Headquarters, because they are considered nationally significant or priority-setting sites.

Removal actions may be taken to respond immediately to an emergency such as a chemical spill or explosion; other time-critical situations that, while not emergencies, require action within six months to protect public health and the environment; or non-time-critical situations that, while posing a near-term threat, allow for a planning period of at least six months before

action must be taken. Specific activities frequently conducted using removal authority include: installing security fencing, controlling the release or spread of hazardous substances, providing alternative water supplies, and removing drums containing hazardous substances. CERCLA limits the scope of removal projects to 12 months or $2 million, although the statute provides for exemptions in certain circumstances.

Indian Tribal governments, like States, may take the lead on non-time-critical removals. Regions must seek approval on Indian-lead removals from EPA Headquarters. EPA will also consult with federally recognized Indian Tribes, just as it does with States, prior to conducting EPA-lead removal actions at sites on or affecting a reservation. This consultation includes discussions on what, if any, post-removal site control may be needed; how it will be conducted; and who will conduct the post-removal activities. In addition to contributing to the planning process, Indian Tribes may participate in National Response Center (NRC) and Regional Response Team (RRT) response and removal activities as they pertain to lands within the jurisdiction of an Indian Tribal government. In this manner EPA ensures that Indian Tribes have an opportunity to be involved in emergency response planning.

D. Enforcement Actions

Under CERCLA Sections 106 and 107, EPA has the authority to take enforcement actions against responsible parties to compel privately financed cleanups or to pursue recovery of response costs. When hazardous substance releases occur on lands within the jurisdiction of an Indian Tribal government, the governing body of the Indian Tribes may pursue independent enforcement actions against responsible parties. Indian Tribes are not eligible to receive enforcement-lead cooperative agreements. EPA retains primary enforcement authority under CERCLA.

Indian Tribal governments may be afforded the opportunity to participate in EPA negotiations with responsible parties for actions on land under the jurisdiction of the Tribal government, or which directly impact such land. The Regional Office will notify the governing body of the Tribe of such negotiations. If the Tribal government participates in the negotiations, it may become a signatory to any settlement document, in the same way States may pursuant to Section 121(f)(2) of CERCLA.

V. COOPERATIVE AGREEMENTS WITH INDIAN TRIBAL GOVERNMENTS

The governing body of a federally recognized Indian Tribe that has jurisdictional authority over a CERCLIS or NPL site may act as the lead agency to conduct Fund-financed response (40 CFR 300.515(b)). Alternatively, an Indian Tribal government may receive funding to defray the cost of its involvement in the Superfund program when acting as the support agency. The requirements for lead and support agency Cooperative Agreements with Indian Tribal governments are set forth in 40 CFR 35 Subpart O. Funds for lead/support agency activities may be provided in a Superfund Cooperative Agreement when:

- The Tribal governing body is willing to designate an agency/office as a single point of contact to interact with EPA on Superfund matters. In most cases, this office should be performing essential governmental functions to promote the health and safety of the affected population within a defined geographic area (analogous to a State agency single point of contact designated by a governor). If the applicant seeks to take the lead in a response action, it must have in place an acceptable procurement procedure that meets EPA requirements on procurement under Cooperative Agreements (40 CFR 35.6550 through 35.6610).

- The applicant for Superfund assistance can demonstrate in the narrative or attachments to its Cooperative Agreement application that the functions to be performed for Fund-financed response at CERCLIS or NPL sites are within the scope of its jurisdiction (analogous to States having jurisdiction only over lands within State borders).

- The applicant for Superfund assistance can demonstrate in the Statement of Work to the Cooperative Agreement that it has the ability to carry out or oversee "any or all" response actions that it seeks to perform. However, Indian Tribes are not eligible to receive enforcement-lead Cooperative Agreements. (See Section IV.D. of this guidance.)

- The applicant for Superfund assistance has in place an acceptable accounting system to receive and track Superfund monies (as required for all recipients of Federal funds).

A. Pre-Application Assistance

Cooperative Agreement applications from the governing bodies of Indian Tribes are acted upon in the same manner as those from States. Applications for Fund-financed response must include a statement of the activities to be undertaken at the site and an itemized budget for each activity. Regional Offices, at their discretion, may assist the governing bodies of federally recognized Tribes in developing draft Cooperative Agreement application packages and may provide other technical assistance to Tribal governments to enable them to enter into Cooperative Agreements for Superfund response. The Regional grant and program offices should explain the application requirements in detail to the Tribal government, to avoid confusion regarding general versus Superfund-specific regulatory requirements (40 CFR 31 - Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments vs. 40 CFR 35 Subpart O).

B. Award Procedures

EPA will notify an Indian Tribe of a Cooperative Agreement award, and establish a Letter of Credit, as addressed in 40 CFR 35 Subpart O. A Letter of Credit (LOC) is a financial document, certified by an authorized official of a Federal program agency and specifying a dollar limit available to a designated payee (the Indian Tribe). The LOC enables the recipient to withdraw cash from the U.S. Treasury concurrently with disbursements. Tribal governments must draw down their reimbursements on the LOC by site and activity (Guidance on Letter of Credit is available from the EPA Office of the Comptroller). The Indian Tribal governing bodies will report, just as States are required to report, on expenditures of Federal funds. Once EPA awards a Cooperative Agreement, Indian Tribes are subject to the same Federal assistance requirements as States in implementing the terms of the agreement and complying with the regulatory requirements of 40 CFR 35 Subpart O.

VI. ADDITIONAL OPPORTUNITIES FOR INDIAN TRIBAL INVOLVEMENT

A. Core Program Cooperative Agreements

Dependent upon the number of sites in CERCLIS and on the NPL, the governing bodies of Indian Tribes, like States, may also enter into Cooperative Agreements for non-site-specific activities to support their involvement in the implementation of the Superfund program in their jurisdictions. Regions should consult with Headquarters to determine whether a Core Program Cooperative

Agreement is appropriate for a specific Tribal government (see also 40 CFR 35.6850 through 35.6875).

B. Superfund Memorandum of Agreement

EPA is proposing in its revisions to the NCP that States enter into a general agreement with EPA to clarify the roles and responsibilities of each agency during interaction on CERCLA implementation. This agreement is called an EPA/State Superfund Memorandum of Agreement (SMOA). A detailed explanation of this agreement can be found in the "Interim Final Guidance on Preparation of a Superfund Memorandum of Agreement," (OSWER Directive #9375.0-01, May 8, 1989). EPA Regional Offices and the governing bodies of Indian Tribes may want to enter into a SMOA when Superfund response is expected to be significant or cross EPA Regional or State boundaries.

The purpose of a SMOA with an Indian Tribal government is to:

- Establish the nature and extent of EPA and Tribal interaction during site-specific response;
- Define the roles and responsibilities of all parties to the SMOA and may, if appropriate, identify the lead and support agencies on a site-specific basis;
- Describe the interaction of all parties regarding review of key documents and other appropriate coordination points; and
- Describe time frames for coordination to ensure that response is not delayed.

A SMOA can be site-specific if there is only one site on or adjacent to lands within a single Tribal government's jurisdiction, or generic if there are several sites of concern. For releases that extend onto or migrate off Indian reservations, a three-party SMOA may be developed among EPA, the governing body of the Indian Tribe, and the State. In addition, when lands within the jurisdiction of a Tribal government cross Regional borders, a multi-Regional State-and-Tribal government SMOA should be negotiated to clarify roles and responsibilities.

VII. REGIONAL RESPONSIBILITIES FOR ENSURING INDIAN TRIBAL INVOLVEMENT DURING RESPONSE

In addition to treating Tribes substantially the same as States under Section 121(f) of CERCLA, EPA Regions are

responsible for inviting federally recognized Tribes to participate in training, workshops, conferences, and meetings that provide technical assistance and involvement for States in the Superfund program. Each EPA Region also has a Regional Indian Coordinator who maintains a liaison with Indian Tribal governing bodies and jurisdictions. In this regard, such things as mailing lists, publications, guidance documents and other State contact or media materials should be inclusive of Indian Tribal governments to afford them equal treatment as States. Information and assistance on these topics may be obtained from the EPA Indian Coordinator in each Region.

VIII. CONTACTS

Should you have any questions or comments regarding the Superfund Administrative regulation you may contact:

Subject Matter	Contact		
General	Jan Baker	FTS:	382-2443
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Legal questions	David Coursen	FTS:	382-5313
Pre-remedial actions	Caroline Previ	FTS:	382-3335
Removal actions	Betty Zeller	FTS:	382-7735

cc: OERR Division Directors and Branch Chiefs
Regional Superfund Branch Chiefs
Director, Grants Administration Division
Director, Financial Management Division
Director, Office of Waste Programs Enforcement
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